

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
2010 Quadrennial Regulatory Review - Review of)	MB Docket No. 09-182
the Commission's Broadcast Ownership Rules)	
and Other Rules Adopted Pursuant to Section 202)	
of the Telecommunications Act of 1996)	
)	
Promoting Diversification of Ownership in the)	MB Docket No. 07-294
Broadcasting Services)	
)	

To: The Commission

**COMMENTS
OF
THE NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS, INC.**

The National Association of Black Owned Broadcasters, Inc. ("NABOB"), by its attorney, hereby submits its Comments in the above-captioned proceedings pursuant to the Commission's Public Notice released June 7, 2013.¹ The Public Notice afforded the public an opportunity to comment on the study sponsored by the Minority Media and Telecommunications Council ("MMTC") and performed by Mark R. Fratrik, Vice President, Chief Economist, BIA/Kelsey ("MMTC Study").²

¹ Public Notice, *Commission Seeks Comment on Study Submitted by the Minority Media and Telecommunications Council in 2010 Quadrennial Review of Broadcast Ownership Rules*, MB Docket Nos. 09-182, 07-294, DA No. 12-1946, (rel. June 7, 2013) ("Public Notice").

² "The Impact of Cross Media Ownership on Minority/Women Owned Broadcast Stations," filed May 30, 2013).

I. INTRODUCTION

The Commission has requested public comment on the MMTC Study regarding the impact of cross media ownership on minority/women owned broadcast stations. The MMTC Study addresses issues raised by NABOB in its Comments filed December 26, 2012, in which NABOB demonstrated that:

1. Any relaxation of any of the Commission's ownership rules will negatively impact minority ownership.
2. Any relaxation of the Commission's ownership rules without a record that shows such relaxation will not harm minority ownership is contrary to the mandate of the Third Circuit Court of Appeals in the *Prometheus II* case.
3. Failure to adopt a policy to promote minority ownership in this proceeding is contrary to the mandate of the Third Circuit Court of Appeals in the *Prometheus II* case.

The Commission's Public Notice requests comment on "the extent to which the Study may or should be relied on by the Commission in the ongoing media ownership and diversity proceedings."³ As NABOB shall explain below, while MMTC should be commended for conducting the MMTC Study for this proceeding, the MMTC Study is not adequate to support the conclusion that any cross-ownership rules should be changed in this proceeding. Below, NABOB will summarize portions of its December 26, 2012 Comments, which set forth the burden imposed upon the Commission by the Third Circuit Court of Appeals in the *Prometheus II* case.⁴ The MMTC Study is not adequate to meet this burden.

³ Public Notice, p. 1.

⁴ *Prometheus Radio Project v. Federal Communications Commission*, 652 F.3d 431 (3d Cir. 2011).

V. THE *PROMETHEUS II* DECISION REQUIRES THE COMMISSION TO REFRAIN FROM CHANGING ANY OF ITS MEDIA OWNERSHIP RULES UNTIL IT HAS DETERMINED THE IMPACT OF ANY SUCH CHANGES ON MINORITY OWNERSHIP

In the *Prometheus II* decision, the Third Circuit Court of Appeals stated:

Despite our prior remand [in *Prometheus I*] requiring the Commission to consider the effect of its rules on minority and female ownership, and anticipating a workable SDB definition well before this rulemaking was completed, the Commission has in large part punted yet again on this important issue.⁵

The Court then instructed the Commission to: (1) “consider the effect of its rules on minority and female ownership,”⁶ (2) consider alternative proposals and definitions for the revenue-based eligible entity definition, such as a socially disadvantaged business (“SDB”) definition, “before it completes its 2010 Quadrennial Review,”⁷ and (3) “synthesize and release existing data [on female and minority ownership] such that studies will be available for public review in time for the completion of the 2010 Quadrennial Review.”⁸ The Court added:

Stating that the task is difficult in light of *Adarand* does not constitute “considering” proposals using an SDB definition. The FCC’s own failure to collect or analyze data, and lay other necessary groundwork, may help to explain, but does not excuse its failure to consider the proposals presented over many years. If the Commission requires more and better data to complete the necessary *Adarand* studies, it must get the data and conduct up-to-date studies, as it began to do in 2000 before largely abandoning the endeavor.⁹

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 438. 471.

⁸ *Id.* at 471 n. 42.

⁹ *Prometheus II*, 652 F.3d at 471 n. 42. The Court has essentially told the Commission to come in with a minority ownership policy based upon the concept of a socially disadvantaged business. The SDB determination was used by Federal agencies before the *Adarand* decision and is still used by some agencies, such as the Small Business Administration and the Department of Transportation. The SDB determination creates a presumption that a business owned by a racial minority has experienced discrimination and disadvantage. The Commission has never explained why the SBA and Department of Transportation can have such policies, but, after eighteen years, the *Adarand* decision prevents it from adopting such a policy.

The Court in *Prometheus II* made clear that it believes the Commission can adopt an “eligible entity” definition that is both race-conscious and meets the requirements of *Adarand*,¹⁰ and the Court expects that definition to be along the lines of the SDB definitions used by other Federal agencies. If the Commission fails to do so in this proceeding, it can reasonably expect to receive another remand of any decision it issues.

The *Prometheus II* decision also makes clear that the Commission may not relax any of its rules until it “considers the effect of its rules on minority and female ownership.”¹¹ To do otherwise would ignore the clear directions of the Court, and constitute a failure to meet the Commission’s statutory obligation to promote minority ownership.

VI. RELAXATION OF THE COMMISSION’S CROSS-OWNERSHIP RULES WILL NEGATIVELY IMPACT MINORITY OWNERSHIP

The Court’s decision in *Prometheus II* placed upon the Commission the burden of demonstrating that a relaxation of any of its ownership rules will not negatively impact minority ownership. This is a burden the Commission cannot meet, because the relaxation of any of its ownership rules will have a negative impact on minority ownership. The manner in which consolidation affects the average minority station owner is as follows:

Minority radio station owners generally tend to own one or two radio stations. When, in 1996, large companies were allowed to own up to eight radio stations in the largest markets, minority owners found themselves in a very difficult position. Large radio group owners could approach advertisers with a single sales force offering up to eight different radio formats, including perhaps a format specifically targeting minority audiences, and purport to deliver all of the desired demographics for that advertiser. A minority owner, programming only to the

¹⁰ *Adarand Constrs., Inc. v. Pena*, 515 U.S. 200 (1995).

¹¹ *Prometheus II*, 652 F.3d at 471.

minority audience, could find advertisers declining to advertise on the minority owned station, based upon the purported ability of the group owner to deliver the minority audience as part of a group buy, at a discounted price.

If these same large radio group owners are now allowed to combine their multiple station ownership advantage with ownership of a daily newspaper, the group owner will be able to combine the radio and newspaper sales forces, and will be able to offer advertisers a combined radio-newspaper buy, which will leave minority owners even more disadvantaged in their efforts to compete in the marketplace.¹²

VII. THE MMTC STUDY IS NOT ADEQUATE TO MEET THE BURDEN IMPOSED BY THE *PROMETHEUS II* DECISION

As noted above, while MMTC should be commended for producing the MMTC Study, the MMTC Study is not sufficient to meet the burden placed on the Commission by the Court in *Prometheus II*. MMTC concedes that the MMTC Study has limitations:

[I]t is important to highlight the limitations of this study's results. This study was not a comprehensive examination of all of the women and/or minority owned stations in all markets in which a commonly owned cross-media operation is present.¹³

In addition, Free Press filed an ex parte notice on June 26, 2013, raising numerous questions and criticisms of the MMTC Study methodology and conclusions. NABOB concurs in many of these questions and criticisms. However, NABOB will not repeat the issues raised by

¹² This discussion of the disadvantage at which minority radio stations must compete is even more applicable to minority television station owners. The television industry is much more difficult for minorities to enter and compete, because, unlike radio, existing owners can purchase all of the most desirable programming and deny a small station access to that programming. In radio, a small station can obtain access to the same music as all existing competitors. The Commission's ownership data, which shows the continuing precipitous decline of African American owned television stations, supports the arguments presented here.

¹³ MMTC Study at 2.

Free Press, because the ultimate issue is “the extent to which the Study may or should be relied on by the Commission” in this proceeding. The MMTC Study explains that it is based upon “fourteen respondents, eight were from minority or women-owned companies and six were from nonminority-men owned companies.”¹⁴ This limited number of total responses, with only eight coming from minority and women respondents combined, is too small a sample to reach any definitive conclusion about adopting national broadcast cross-ownership policy. Even without considering the additional questions and concerns raised by Free Press, the MMTC Study is too limited to be the basis for a change in the Commission’s radio-newspaper or television-newspaper cross-ownership policies, in light of the obligations placed upon the Commission by the Third Circuit Court of Appeals in the *Prometheus II* case.

VIII. CONCLUSION

As demonstrated in NABOB’s December 26, 2012 Comments in this proceeding, the decline in minority broadcast station ownership since: (1) the repeal of the tax certificate in 1995, (2) the Adarand decision in 1995, and (3) the enactment of the Telecommunications Act of 1996 has been precipitous. The *Prometheus II* case places the burden on the Commission to make no changes in its ownership policies unless it has adequate record evidence to demonstrate that any such changes will not negatively impact minority ownership of broadcast stations. The MMTC Study is too limited to support such a conclusion.

Respectfully submitted,

¹⁴ MMTC Study at 4, n. 4.

**THE NATIONAL ASSOCIATION OF BLACK
OWNED BROADCASTERS, INC.**

By: /s/ James L. Winston
James L. Winston
Executive Director and
General Counsel
National Association of Black Owned
Broadcasters, Inc.
1201 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036
(202) 463-8970
jwinston@nabob.org

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